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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Appellant,

v.

DONALD A. McNEIL,

Defendant and Respondent.

B172485

(Los Angeles County
Super. Ct. No. SA049644)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Elden S. Fox, Judge. Affirmed.

Steve Cooley, District Attorney, Brent D. Riggs and Matthew G. Monforton,
Deputy District Attorneys, for Plaintiff and Appellant.

Michael P. Judge, Public Defender, Albert J. Menaster, Julie Leeds, and
Alex Ricciardulli, Deputy Public Defenders, for Defendant and Respondent.

Donald McNeil entered a no contest plea to one count of attempted robbery and one count of assault with a firearm, and admitted he had suffered two prior strike convictions and one prior serious felony conviction. The trial court dismissed one of the strike priors and sentenced McNeil to state prison for a term of 17 years. The People appeal, claiming the trial court abused its discretion when it dismissed the strike prior. We disagree and affirm the judgment.

FACTS

A.

In August 2003, McNeil followed Stacy Zimmerman home and accosted her in her garage as she was getting out of her car. Armed with a gun, McNeil told her to get back in her car. She complied. McNeil then told her to give him her purse and rings. When Zimmerman hesitated, McNeil hit her on the head with his gun and again ordered her to give him her purse and rings. Zimmerman asked McNeil to settle for the purse, explaining that the rings had belonged to her parents who had recently died. McNeil again hit Zimmerman on the head with his gun and asked whether she wanted to be hit a third time. At that point another car approached and McNeil ran off. Zimmerman called the police and McNeil was apprehended while still in the area.

McNeil was charged with attempted robbery and assault with a firearm, with allegations that he personally used a firearm and personally caused great bodily injury, and that he had suffered two prior strikes (a 1987 conviction of assault with a firearm and a 1993 conviction of bank robbery) and one prior serious felony conviction.

B.

McNeil filed a motion in which he asked the trial court to dismiss the 1987 strike (Pen. Code, § 1385, subd. (a)), explaining that the conviction arose from an incident in which he was the victim of a "botched robbery" in which an assailant tried to pull a necklace from McNeil's neck.¹ When the assailant's two cohorts approached McNeil, McNeil pulled a gun from his pocket and fired it repeatedly, killing one of the assailants. Pursuant to a plea agreement, McNeil pled guilty to assault with a firearm. Probation was granted with 10 months in jail.

The 1993 prior is based on McNeil's conviction as an unarmed aider and abettor of a bank robbery (he drove the getaway car). As a result of this conviction, McNeil was in federal custody from 1991 to 2000.

The People opposed McNeil's motion, pointing to the violent nature of his current offenses and his extensive criminal history, which includes a 1986 conviction of misdemeanor carrying a loaded firearm in a public place for which he was placed on probation; a 1986 conviction of misdemeanor possession of a controlled substance for which he was granted diversion, which was not successfully completed; a 1987 felony conviction of assault with a firearm (the first strike described above); a 1987 conviction of possession of a controlled substance for sale for which probation was granted with jail time served concurrently with the assault conviction; a January 1988 conviction of misdemeanor receiving stolen property for which probation was granted with

¹ All section references are to the Penal Code. Although the written motion is vague about whether McNeil was asking the court to dismiss one or both strikes, it became clear at the subsequent hearing that the focus was on the 1987 strike.

jail time, and which led to the revocation of probation in the first strike case; a February 1988 parole violation and some time in prison; a 1989 conviction of grand theft auto; a 1991 conviction of possession of a dangerous weapon for which probation was granted with jail time; and a 1991 conviction for the bank robbery described above, the second strike. McNeill was on federal parole when he committed the current offenses.

C.

After reviewing McNeil's motion (and the file from the 1987 assault case) and the People's opposition, the trial court gave an indicated sentence of 17 years in prison, which would include the dismissal of one strike and custody credits limited to 15 percent. The court said it found "some mitigating circumstances in [McNeil's] history that [caused the court] to believe that at 37 years old [the court did not] feel that [McNeil] should die in prison," and that the 17-year sentence would mean McNeil would be eligible for parole at the age of 52, which the court described as "fair under the circumstances of [McNeil's] history, the circumstances of [the current] case, and [McNeil's] prior situations."

With that understanding, McNeil entered his no contest plea. After both sides argued the propriety of dismissing a strike and over the prosecutor's continuing objection, the trial court dismissed the 1987 strike allegation based on the following findings:

"But for the circumstances surrounding that particular prior conviction, which occurred in 1987, the court would concur with the District Attorney's position . . . that Mr. McNeil might be a poster child for three-strikes' application in this case.

"But as noted in the court's review of the file, in that case Mr. McNeil was involved in apparently the discharge of a firearm which resulted in the death of what appears to be an assailant involved in either a strong-armed robbery or some other type of theft and that, in reviewing the file, it's clear from the probation report that the court at that time did view Mr. McNeil as somewhat of a victim in terms of the circumstances in that the District Attorney at that time agreed to amend the complaint, add a 245 in this matter, and the court in that case granted probation as opposed to imprisonment in state prison.

"It appears from my review of the probation report in that prior conviction that the victim and other participants in this may have been members of an organized gang in South Central Los Angeles and that Mr. McNeil in that case apparently feared for his life in terms of the moment and also any retaliation that may have resulted from his resistance to that robbery.

"The court does note, in addition, that the defendant would have been on probation on that case to its conclusion but for the fact that he did pick up a grand theft of an automobile, which occurred in 1987. It was filed as a misdemeanor.

"He was then on probation also on a narcotics violation, and as a result of the new matters, the probation in those two cases was revoked, and he was sentenced to a concurrent term, which included the 245(a)(2), which is the prior serious felony in this case.

"The court, in reviewing Mr. McNeil's history, does note that most of his history has involved the use of narcotics and/or its sale and/or possession for sale and theft offenses up until the 1986, 1987 conviction. After that, his involvement with law enforcement continued in 1991 with a misdemeanor weapons charge, which apparently resulted in a probationary sentence also. It appears that was not a firearm.

"The next occasion for Mr. McNeil's presence before the criminal justice system was the federal charges in which it appears that Mr. McNeil was an aider and abettor in a bank robbery and/or robberies which resulted in an extensive sentence for which the defendant is currently on parole, that is, federal parole; however, it is clear from the court's review of the materials in this matter that there was no allegation that Mr. McNeil used a firearm during the course and commission of that offense.

"This court did have the opportunity to hear the preliminary hearing, and I do not intend in any way to diminish the seriousness of the current offense. It was a frightening experience for the victim. It appears that she was in a very vulnerable state both physically and emotionally at the time of the incident.

"It appears that the evidence is that Mr. McNeil may have followed her from another location, attempted to confront her and take some jewelry that was in her possession, and that because of the recent death of her parents, she apparently resisted resulting in Mr. McNeil's application of force by striking her with what appears to be a firearm in the area of her shoulder and head resulting in a laceration which required two staples to close.

"Having said that, the court does also note that it appears that that firearm was loaded at the time of the commission of the offense and that, although it was loaded, it does not appear . . . that Mr. McNeil intended to discharge that weapon although its use certainly could have resulted in a . . . more serious injury than the victim suffered as a result of this incident.

"The court is mindful of the fact that, in fashioning a sentence and looking at the particular facts and circumstances, the court must look at a prior history and record. While it can be said that Mr. McNeil's contacts with law enforcement . . . have been rather continuous off and on in terms of probationary sentences and the two commitments to both state prison and federal prison, that, as noted, most of

those have involved nonviolent offenses without the application of force, which included the narcotics violations and the theft violations.

"In addition, the court is mindful that Mr. McNeil is 36, going to be 37 years old, and that the court, in determining the applicability of the prior conviction as identified from 1987, does note that the defendant did successfully complete parole. As to whether he has or would turn his life around, that is still a question mark which obviously has to be considered by the court.

"I do not take lightly the fact that Mr. McNeil is at this point in time and at a stage of the proceedings prior to the requirement of the case going to trial accepting responsibility for this offense fully and that he does recognize, if an appellate court at a future point determined that there were not sufficient circumstances to justify the court's discretion, that he could be facing a far more significant sentence which could include essentially a life sentence in prison.

"The court is also mindful of the fact that -- in this particular case that the victim in this matter has suffered both psychologically, emotionally, and physically in this matter, and a disposition . . . which encompasses a 17-year sentence, does enable the victim to avoid the need to have to appear in court in the future and also be subject to further emotional and psychological trauma.

"The court must also determine in fashioning a sentence whether the sentence that is fashioned will also be a sufficient deterrent not only for future violations of the law but also ensure the protection of the community as required by the application of the sentencing statute.

"In addition, the mitigating factors in this matter as it relates to . . . the defendant's own personal life experiences is somewhat outlined in terms of the 1385 motion . . . , and while the court . . . does not utilize that as an excuse for Mr. McNeil's continued violations of the law, it does say to some extent that the defendant should be given the opportunity to reform

his behavior and . . . hopefully at some point in time before the end of his life be able to become a contributing member of the community.

"The current offense is serious. The current offense is a violent felony. The current offense did involve the potential for great bodily injury or death but for issues that may have arisen, not only those that may have been unexpected but, in the court's mind, based on the circumstances of this case, may have been also some impulse control by Mr. McNeil in that he did not attempt to discharge the weapon and/or cause even more . . . serious injury to the victim who apparently resisted his entreaties to release the jewelry that she possessed at the time of this incident.

"Mr. McNeil, the statutory process that has been set up does entitle the court to essentially sentence you until you die in prison. I don't think you're someone that's deserving of a sentence such as that, and I think that there is some glimmer in terms of some future productive participation in the community when you are released on parole in this matter, and the court does believe that a 17-year sentence will enable you to address some of those issues which appear to be related to not only drug addiction but also a lack of direction in your life, and because of those factors, the court believes that it would be appropriate in these circumstances, based on the age of that prior conviction as outlined in this matter, to dismiss this pursuant to 1385 of the Penal Code.

"Having said that, the court will request the court reporter to provide a complete transcript of the court's findings in this matter to be incorporated in the minutes of this particular hearing.[²]

"In addition, I have reviewed the medical reports as it relates to the great bodily injury allegation. The court does

² Based on the court's order to incorporate its oral statement into the minutes of the sentencing hearing, we summarily reject the District Attorney's contention that the sentence must be reversed based on the court's failure to state its reasoning in its minute order.

note that the victim in this matter was treated and released at the hospital. There appear to be no indications that there was any permanent injury that she suffered, although not required for great bodily injury, and that under the circumstances the court believes that . . . it is within its discretion to dismiss the 12022.7 allegation . . . and does so for purposes of this disposition."

McNeil was then sentenced to state prison for a term of 17 years.

DISCUSSION

In a series of related arguments, the District Attorney contends the trial court abused its discretion by (A) impermissibly "relying upon 'remoteness'" as a factor for dismissing the 1987 strike allegation, and (B) failing to make any reasonable assessment of McNeil's crimes or his "'background, character and prospects.'" We disagree.

A.

The record does not support the District Attorney's contention that the trial court impermissibly relied on the remoteness of the 1987 strike as a basis for dismissing it. While it is true that the court referred to the remoteness of the offense toward the end of its statement of reasons, our lengthy quotation of the court's entire statement shows that the District Attorney's assertion is based on a single phrase taken out of context.

Whatever merit there may be to the District Attorney's assertion that *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, "did not give trial courts *carte blanche* to dismiss strikes," the point is irrelevant here -- where the court did not dismiss the strike for any of the reasons condemned by *Romero* (e.g., to

accommodate judicial convenience, or because of court congestion, or simply because McNeil pleaded guilty, or out of personal antipathy for the effect of the three strikes law). (*Id.* at p. 531.)

The District Attorney has not shown (clearly or otherwise) that this 17-year sentence is "irrational or arbitrary," or that the mere mention of the remoteness of the 1987 strike somehow overcomes the presumption that the trial court's sentencing decision was made to achieve legitimate sentencing objectives. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978-980; *People v. Garcia* (1999) 20 Cal.4th 490, 501-502.) Indeed, *Alvarez* condemns an approach that views one factor in isolation, the very thing the District Attorney has done in this case, noting that such a "limited perspective is . . . incompatible with the very nature of sentencing discretion [where] the entire picture must remain exposed." (*People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th at p. 981; and see *People v. Williams* (1998) 17 Cal.4th 148, 161.)

B.

For the same reasons, we reject the District Attorney's contention that the trial court failed to "make any reasonable assessment of McNeil's crimes or his 'background, character and prospects.'" The court is, as the District Attorney says, required to consider the nature and circumstances of the present crimes as well as the prior strikes, and the particulars of the defendant's background, character and prospects -- all of which the trial court did in considerable detail, explaining that in its view there were sufficiently extraordinary circumstances (all of which are set out above) to persuade the court that this was an appropriate case in which to dismiss one strike. (*People v. Williams*, *supra*, 17 Cal.4th at pp. 160-161.)

The fact that the District Attorney views this as an inappropriate case for dismissing a strike does not mean the trial court abused its discretion when it concluded otherwise. To the contrary, the fact that the prosecutor and the reviewing court may be of the opinion that McNeil appears undeserving of leniency is not the paramount consideration; rather, what counts is what the trial court concluded, and the mere fact that others might reach a different result is not in itself sufficient to show an abuse of discretion. (*People v. Bishop* (1997) 56 Cal.App.4th 1245, 1251.)

The District Attorney claims McNeil's current crimes "reveal[] nothing that would warrant a dismissal of a strike" and simply ignores the fact that the sentencing court was the same court that presided over McNeil's preliminary hearing and was thus in a very good position to conclude, as it did, that the victim's injury was not as severe as claimed by the prosecutor, and that McNeil's conduct was, all things considered, not as heinous as the prosecutor described it. While it is true that McNeil had a loaded gun, the court found (based on McNeil's conduct) that he did not intend to discharge it. Whatever the District Attorney may think about this sentence (which at 17 years is substantial by any rational definition), and whatever we might have concluded had the trial court dismissed both prior strikes, the only relevant point on this appeal is that the People have failed to demonstrate an abuse of discretion.³

³ The District Attorney's incomplete assessment of McNeil's character is based entirely on the fact that McNeil has a criminal record and was still on federal parole when he committed his current offenses. This trial court took into account McNeil's troubled youth (he was raised by his mother and her abusive boyfriend until he was eight, at which time he was removed from his family and ultimately given up to foster care, where he lived until he ran away at age 15). There is more of the same in the record, all of which was considered by the trial court, and all of which is ignored by the District Attorney.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

ORTEGA, Acting P.J.

MALLANO, J.